



Federal Communications Commission
Washington, D.C. 20554

April 1, 2011

DA 11-591

Richard A. Belden
Chief Operating Officer
Universal Service Administrative Company
2000 L St., N.W., Suite 200
Washington, DC 20036

Dear Mr. Belden:

This letter responds to a request by the Universal Service Administrative Company (USAC) for written guidance regarding implementation of the interim caps on high-cost, competitive eligible telecommunications carrier (competitive ETC) support for AT&T and ALLTEL, which were adopted as conditions of their respective mergers in late 2007, several months before the Commission adopted the interim cap for all competitive ETCs.¹ In this letter, we make clear that USAC should implement the company-specific interim competitive ETC caps for the time period from the consummation of each respective merger² until the industry-wide cap went into effect on August 1, 2008.

When it approved the merger of ALLTEL Corporation and Atlantis Holdings LLC, the Commission “impose[d] an interim cap on high-cost, competitive ETC support provided to ALLTEL as a condition of this transaction,” which, the Commission concluded, would “apply until fundamental comprehensive reforms are adopted.”³ The Commission imposed a similar interim cap on AT&T when it merged with Dobson Communications Corporation.⁴ Several months later, the Commission adopted an industry-wide cap on high-cost support for all competitive ETCs and noted in a footnote that “[t]he interim cap adopted in this Order supersedes the interim caps on high-cost, competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*.”⁵

¹ Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, Wireline Competition Bureau, FCC, WC Docket Nos. 05-337, 06-122, at 5 (filed Aug. 24, 2009) (USAC Letter).

² The AT&T-Dobson merger was consummated on November 15, 2007. *See* ULS File No 0003092368. The ALLTEL-Atlantis Holdings merger was consummated on November 16, 2007. *See* ULS File No. 0003040113.

³ *See Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee for Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, 22 FCC Rcd 19517, 19521, para. 9 (2007) (*ALLTEL-Atlantis Order*).

⁴ *See Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20329-30, paras. 71-72 (2007) (*AT&T-Dobson Order*).

⁵ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8837, para. 5 n.21 (2008) (*Interim Cap Order*).

On August 21, 2009, USAC sought guidance from the Commission on how to implement the Commission's orders imposing these competitive ETC caps. In particular, USAC explains that it "believes that it is required to implement the orders for AT&T and Alltel company-specific caps for the time period each respective order was in effect until the date it was superseded . . . because the [competitive ETC] industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively."⁶

We agree. The company-specific merger orders imposing interim caps on each company took effect pursuant to their terms, notwithstanding the fact that it would take some time before USAC would be able to calculate the adjusted support amounts for each company. Each cap, imposed as a condition of the Commission's approval of a merger, took effect on the date the merger was consummated⁷—November 15, 2007 for the AT&T-Dobson merger and November 16, 2007 for the ALLTEL-Atlantis Holdings merger.⁸ By its terms, the Commission's later *Interim Cap Order* superseded the company-specific orders; it did not, however, have any retroactive effect or nullify the prior orders.⁹ As a result, the company-specific interim caps were in effect—even if USAC had not at the time implemented them—until the effective date of the *Interim Cap Order*, after which the industry-wide interim cap went into effect.

⁶ USAC Letter at 5. The Wireline Competition Bureau sought comment on the request for guidance. See *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, 24 FCC Rcd 12093 (2009).

⁷ In the *ALLTEL-Atlantis Order*, the Commission explained that it was "impos[ing] an interim cap on high-cost competitive ETC support provided to ALLTEL as a condition of this transaction." *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19521, para. 9 (emphasis added). The order clearly contemplated that the limit on ALLTEL's universal service support was directly tied to the proposed merger; indeed, ALLTEL, upon learning of the condition, was free to choose not to consummate the transaction, in which case the condition imposed never would have been triggered. And there is nothing in the text that would suggest that the limit on competitive ETC support should be calculated from any other date. Likewise, in the AT&T-Dobson merger, AT&T offered, as a voluntary commitment, to have a similar condition placed on it. See *AT&T-Dobson Order*, 22 FCC Rcd at 20329, para. 71. The Commission, in language similar to the *ALLTEL-Atlantis Order*, noted that it was "condition[ing] [approval of] the transaction on this voluntary commitment." *AT&T-Dobson Order*, 22 FCC Rcd at 20330, para. 72. Nothing in the commitment, or the Commission's order approving the transaction, suggested that the cap should apply from any date other than the date the transaction was consummated—just like the ALLTEL cap on which the AT&T cap was modeled.

⁸ See *supra* note 2.

⁹ Verizon asserts that Commission staff indicated that the ALLTEL-specific interim cap would not be implemented, and further argues that it would be unfair to require it to disgorge funds when those funds had already been spent in a manner consistent with universal service fund requirements. See Comments of Verizon and Verizon Wireless, WC Docket Nos. 05-337 and 06-122, CC Docket No. 96-45 at 17-29 (filed Oct. 28, 2009). The Commission has repeatedly held that carriers cannot rely on informal staff guidance. See, e.g., *Kojo Worldwide Corp. San Diego, California*, 24 FCC Rcd 14890, 14894 (2009) (rejecting argument that staff had promised non-enforcement of provisions of the Act); *Applications of Hinton Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637, para. 42 (1995) (noting that when staff advice is contrary to the Commission's rules, the Commission may enforce its rules despite reliance by the public). See also *Malken FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991).

Finally, nothing in this letter should be understood to require a recalculation of the amount of the industry-wide cap on high-cost support for competitive ETCs. The interim cap was calculated, properly, without regard to these company-specific caps, and the implementation of the caps now does not alter the proper calculation of the interim cap amount.

If you have any questions regarding this letter, please do not hesitate to contact me at 202-418-1500.

Sincerely,

Sharon E. Gillett
Chief
Wireline Competition Bureau